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In the Supreme Court of the United States

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner's Reply to the Brief in Opposition

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Argument

A. Petitioner Has Never Conceded That There Was an Absence of Prejudicial Error.

Pages 9-10 of the government's Brief in Opposition (U.S. Br.) states:

> As the court of appeals observed, petitioner concedes that the SSBs' decisions in 1993 not to recommend him for promotion were free of error. ... Pet. App. 13, 21; see also Pet 18. Notwithstanding his concession that the errors before the promotion boards ... were not prejudicial, petitioner seeks constructive reinstatement, back pay, and related benefits for approximately nine years.

This argument reflects a misunderstanding both of the court of appeals' observations and of the Petitioner's position. The Petitioner does not challenge his 1993 SSB non-selections because he does not seek promotion; instead, he seeks his distinct and separate remedy of back pay in his current grade. By not seeking a promotion remedy, the Petitioner has *not* conceded an absence of prejudicial error. To the contrary, throughout these proceedings, Petitioner has

maintained that his 1993 SSBs were supercompetitive and, for this reason and many others, an unfair substitute for his vested pay rights under 37 U.S.C. § 204 and 10 U.S.C. § 1552. Appellee's Br. at 7,-8, 11, 18, 29-31; Pet. Br. at 17-18, 25, 35-37.

B. The Continuation of Pay in an Officer's Current Grade Does Not Constitute a "Windfall."

The government's argument that back pay constitutes a "windfall" (U.S. Br. at 9) is unmeritorious for three reasons. First, an active duty officer's entitlement to continuing pay in his current grade is established by Congress and, hence, is not a "windfall" but a "right." Second, the government's argument ignores the importance of back pay in the system of carefully balanced rights afforded to active duty military officers. Third, SSBs cannot and do not establish "harmless error" in a back pay action.

1. Active duty officers' ***rights*** to pay in the "up or out" promotion system are defined by seven statutes: 37 U.S.C. § 204 and 10 U.S.C. §§ 628, 631, 632, 633, 634, and 635.

37 U.S.C. § 204 entitles an active duty officer who is unlawfully separated to draw pay in his *current* grade until he is properly separated.[1]

10 U.S.C. § 628(d)(2) entitles an active duty officer who meets a special selection board (SSB) to receive back pay in a ***higher*** promoted grade, provided that he is promoted.

10 §§ 631-635 create two distinct "up-or-out" schemes and define two distinct rights to continue serving on active duty. For lower ranking officers like the Petitioner active duty status may be terminated six months after the

[1] This right is implicit in and intrinsic to 37 U.S.C. §§ 204 and 206. Pet. Br. at 1-2, 20 n7.

receipt of two promotion non-selections. 10 U.S.C. §§ 631, 632. Under this scheme, if a promotion board is never convened or if, for some reason, it is voided, there is no triggering event for separation under Sections 631 or 632 and the officer continues to serve on active duty in his current grade. Promotion selection is in no way a prerequisite for continuing service; instead, voidance of a promotion passover establishes the officer's continuing active duty status.

For officers serving in or above the rank of lieutenant colonel (commander in the Navy), the right to continue on active duty is defined differently. In the case of a higher-ranking officer, the right to continue serving in one's current grade is contingent upon *selection* by a promotion board. 10 U.S.C. §§ 633, 634, and 635. Under this distinct "up or out" scheme, if a promotion board is held to be defective and void, the officer's separation from active duty is unaffected. This is because selection by a promotion board is a prerequisite for continuing service.

The government's assertion that back pay in an officer's *current* grade is a "windfall" (U.S. Br. at 9) betrays a misunderstanding of the foregoing statutory scheme. The right to continue drawing pay in one's *current* grade is separate and distinct from the right to draw pay in a *higher* grade. Moreover, for lower-ranking officers, the right to continue on active duty is not at all contingent upon SSB selection. To argue that a lower-ranking officer's constructive continuation on active duty produces a windfall in the absence of a promotion selection is a repudiation of the distinct statutory rights that *Congress* has guaranteed to officers in the lower ranks.[2]

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[2] Cf. Bell v. United States, 366 U.S. 393 (1961) (traitor held entitled to statutory pay based on active duty status).

2. In addition, the government's windfall argument ignores the importance of back pay in a system of rights in which servicemembers' individual rights of action are strictly curtailed. The statutory right of pay is one of the very few legal rights that active duty officers are permitted to assert against their Service. Indeed, these back pay rights are assured to officers in lieu of many other rights that civilian Americans freely enjoy. See, e.g., 2 U.S.C. § 190(g) (servicemembers denied the right to petition Congress for record corrections); 40 Op. Atty Gen. 504 (1947) (Congress' authority to issue new discharges triggering back pay transferred to the BCMR in 10 U.S.C. § 1552); Chappell v. Wallace, 462 U.S. 296, 303 (1983) (servicemember denied Bivens remedy because of availability of back pay remedy under Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) and Grieg v. United States, 640 F.2d 1261 (1981), cert. denied, 455 U.S. 907 (1982)).

3. A third flaw in the government's "windfall" argument is that military SSBs do not establish "harmless error." Section 1552(a) authorizes Service Secretaries, acting through *civilian* boards, to correct military records. 32 C.F.R. § 865.9 (set forth in Pet. Br. at 13) establishes that "probable material error" is one of the elements of a correction claim that must be decided by the BCMR. DoDD 1320.11, Definitions, ¶ 4 (set forth in Pet. Br. at 10) establishes that military SSBs do not advise the BCMR about whether there was "harmless error." See also Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) (when a decision is entrusted to the discretion of a board, the board cannot substitute another's judgment for its own).

Unlike the BCMR, which has full knowledge of the facts in an applicant's case and is charged with rendering justice in individual cases (10 U.S.C. § 1552(a)), an SSB has a limited record (10 U.S.C. § 628(b)(2)) and is charged with meeting

the needs of the military department (10 U.S.C. § 617(a); Pet. App. 141, 146). Typically, an applicant meets an SSB with a significant gap in his record. (Petitioner's top OER, representing a quarter of his career, was omitted when he met his first 1993 SSB). Although SSB members may not discriminate against an applicant who has record gaps, neither do they have any basis for compensating for such gaps. Under 28 U.S.C. § 628(b)(2), SSB members are limited to review of an officer's record as it would have appeared to the original board in the absence of error. They know nothing about the circumstances that prompted correction of the candidate's record. They have no idea whether the officer's performance during the record gap was comparable to that of the comparison benchmark candidates whose records are before them. In short, although the SSB process is deemed fair for the purpose of vindicating a non-right to promotion, it is not a substitute for the deliberative process used by the BCMR to determine officers' vested pay rights under 37 U.S.C. § 204.

The government's argument is further undermined by its admission in open court (Pet. App. 170-87) and the trial court findings (Pet. App. 52-53 n4, 74, 74 n18, 92 n4) that the Air Force's SSBs are supercompetitive (i.e., more competitive than the original promotion boards). The only "evidence" in this case to the contrary is an unsupported, ex parte, post hoc statement in the Second Addendum, which, as Petitioner has pointed out, not only appears to have illegally and fraudulently issued[3], but is also contradicted by the government's own internal records (Pet. App. 164-65, 168-69).

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[3] As demonstrated in Porter's conditional motion for remand (Pet. App. 148-169) and the Addendum attached to Porter's principal appellate brief, the AFBCMR has a long history of such fraud in its proceedings.

In sum, what the Air Force seeks is to exchange active duty officers' vested pay rights under 37 U.S.C. § 204, their constitutional right to petition Congress, their right under 10 U.S.C. § 1552 to redress in the civilian BCMR, and various other rights, for the *burden* of engaging in years of burdensome litigation against the United States Justice Department in an attempt to reform a broken SSB process.[4] Even if that litigation were to succeed, the result would be a system in which the military is the sole and exclusive arbiter of its own errors and injustices and has no economic incentive to afford just and prompt relief. By fighting against this scheme, Air Force officers are not seeking a "windfall."

C. The Desire Not to Intrude into "Military" Matters Does Not Accord the AFBCMR Discretion to Withhold Relief Under 10 U.S.C. § 1552.

The government does not respond to the Petitioner's point of error that the AFBCMR's use of an "egregious error" standard violates 32 C.F.R. § 865.9 (set forth in Pet. Br. at 13). Instead, it seeks to reframe the issue in terms of the Secretary's and the AFBCMR members' discretion to withhold relief so as to avoid involvement in "military" matters. U.S. Br. at (I) (Question Presented), 10-11. This approach is misguided for several reasons.

First, involvement in "military" matters is a BCMR's *raison d'être*. Pursuant to Section 1552, the Secretary of the

[4] The difficulty of such litigation is demonstrated by Small v. U.S., 158 F.3d 576, 581 (Fed. Cir. 1998) (petition for cert. pending). In 1991, Major Small commenced a challenge against the Air Force promotion board process on the ground that the majority of promotion board members sign a blank board report with no knowledge of the board's deliberations or results. The court of appeals held that federal law "does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record."

Air Force and the members of the AFBCMR involve themselves deeply in "military" matters on a regular basis. For example, the evaluation of a military officer is a purely military function. Yet this case is a prime example of the AFBCMR's willingness to intervene in such matters. Pet. App. 109. Moreover, so entrenched is the AFBCMR's involvement in "uniquely military matters" that it has, on occasion, directed that officers be promoted on its record-correction authority – without that officer being recommended by any promotion board convened under Title 10." See OpJAGAF 1994/17 (attached to letter by Kathleen St. John to Clerk, Court of Appeals, dated May 14, 1998).

Under Section 1552(a), the responsibility to correct military records devolves to the Secretaries of the Military Departments acting through boards composed of executive members of their departments. Courts defer to the BCMR because of their expertise in "military" matters, which courts lack.[5] It defies all logic (and is contrary to historical practice) for the government to turn around and say that the Secretary of the Air Force and his subordinate executive members, who exercise oversight responsibility over all of the Air Force's military functions, may not become involved in "military" matters in the AFBCMR

Furthermore, the government incorrectly suggests that the BCMR is not mandated to grant full monetary relief. U.S. Br. at 11. In the 1950's, Congress' recent delegation of its legislative authority to BCMRs ignited a constitutional controversy in military circles. At the heart of this controversy was the concern that there were no standards in 10 U.S.C. § 1552(c) governing the Secretary's discretion to award back pay, in violation of the separation of powers and

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[5] As the government correctly notes, BCMR cases are reviewed using the "arbitrary and capricious" standard. U.S. Br. at 2.

non-delegation doctrines. Cf. Loving v. United States, 517 U.S. 748, 770 (1996) (Congress must provide "intelligible principles" to guide executive in exercise of discretion). In order to protect Section 1552 from constitutional challenge, the Comptroller General opined in 1954 that servicemembers must be awarded the payment that "would have been due if the error or injustice had not existed originally." 34 Comp. Gen. 7-10 (1954). In 1972, this view was reaffirmed in Ray v. United States, 453 F.2d 754, 756 (Ct. Cl. 1972). Accord, Sanders, supra, 594 F.2d at 813; Denton v. United States, 204 Ct. Cl. 188 (1974); DeBow v. United States, 434 F.2d 1333 (Ct. Cl. 1970), cert. denied, 404 U.S. 846 (1971); H.R. Rep. No. 82-499, 82nd Cong., 1st Sess. (1951) ("if military and naval personnel have been improperly aggrieved as a result of an error beyond their control, the payment of any sums of money, regardless of the amount, is merely collateral to the correction of the injustice.") See also Russell O. Wheeler, *The Secretary of the Air Force, Correction of Military Records and the Limits of Discretion*, 7 Fed. Cir. Bar J. 193, 204-215.

In addition, 32 C.F.R. § 865.9 (1992) (set forth in Pet. Br. at 13) limits any discretion by the Board to deny a record correction request:

> The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him or her, that effective relief cannot be granted, or that the applicant did not file his or her application within 3 years after he or she discovered or reasonably could have discovered the alleged error or injustice . . . .

D. Section 628(b)(2) Does Not Authorize "Relation-Back" of an SSB Non-Selection

Prior to Porter, it was understood that 1) an officer was entitled to pay in his current grade until properly separated, Sanders, supra, 594 F.2d at 510; 2) that promotions accomplished through specially-convened promotion boards related back, Doyle v. United States, 599 F.2d 984, 1000 (Ct. Cl. 1979) (en banc), cert. denied, 446 U.S. 982 (1980); and 3) that non-selections by special boards did **not** relate back, ibid. Acting within this jurisprudential framework, Congress enacted 10 U.S.C. §§ 628(b)(3) and (d)(2). Subsection (d)(2) addresses SSB promotions and expressly makes them retroactive; subsection (b)(3) addresses SSB nonselections gives them **no** retroactive effect.

The government ignores both of those subsections, and contends that another provision, subsection 628(b)(2), requires relation back of SSB nonselections. U. S. Br. at 9. This contention lacks merit. 10 U.S.C. § 628(b)(2) merely requires the SSB to consider the "record of the officer as his record, if corrected, would have appeared to the board that [originally] considered him." This statutory provision is completely unremarkable and implies no relation back of an SSB non-selection--especially when Subsection (b)(3) gives no such effect. *Of course*, SSBs should examine records as they would have appeared to the original board without error in the original proceeding. Would there be any sense in allowing SSBs to examine the uncorrected records that caused the problem in the first place? Subsection (b)(2)'s plain purpose is to define the record that is reviewed by an SSB; it is not to overrule Sanders and Doyle, to eliminate substantive pay rights under 37 U.S.C. § 204, or to detract from the plain language of Subsection (b)(3).

E. The Court of Appeals Did, in Fact, Rely on the Second Addendum.

The government maintains that the central issue herein is the AFBCMR's discretion to grant SSB consideration in lieu of a military back pay remedy. U.S. Br. at (I). Petitioner maintains that this issue cannot be resolved without addressing whether it was an abuse of discretion to substitute a super-competitive SSB standard for the "probable material error" standard set forth in the AFBCMR's regulations.

The Air Force admitted and the lower court found that the Air Force's SSBs are supercompetitive (Pet. App. 52-53 n4, 74, 74 n18, 92 n4, 170-87). The court of appeals' only response to this untidy fact was to repeat unsupported, disproved, ex parte, post hoc, and ostensibly fraudulent statements in the Second Addendum. Pet. App. 45. Certainly, there is sufficient error in this case to reverse and render without ever considering the fraudulent nature of the Second Addendum; it is incorrect to argue, however, that the court of appeals decision was unaffected by fraud.

Conclusion

The petition for writ of certiorari should be granted.

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